

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

09	LARK HOLLAND,	)	CASE NO. C04-2349-RSM
10	Plaintiff,	)	
11	v.	)	REPORT AND RECOMMENDATION
12	JO ANNE B. BARNHART, Commissioner	)	RE: SOCIAL SECURITY
13	of Social Security,	)	DISABILITY APPEAL
14	Defendant.	)	

Plaintiff Lark Holland proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Disability Insurance (DI) for the period from January 16, 2001 through November 4, 2001 after a hearing before an Administrative Law Judge (ALJ).

Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, it is recommended that the Commissioner be AFFIRMED.

**FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1952.<sup>1</sup> He has a high school education and previously worked in security, plastics fabrication, and cooking. Plaintiff suffered heart attacks on November

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<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 27, 2000 and January 16, 2001. After each attack, plaintiff unsuccessfully attempted to return to  
02 work.

03 Plaintiff filed an application for DI benefits based on his heart impairment on February 11,  
04 2002, alleging a disability onset date of June 15, 2001. He later amended the onset date to January  
05 16, 2001. Plaintiff's application was denied initially and on reconsideration, and plaintiff timely  
06 requested a hearing.

07 ALJ Verrell Dethloff held a hearing on September 24, 2003. (AR 344-96.) He heard  
08 testimony from plaintiff, medical expert Alvin Thompson, and vocational expert Leta Berkshire.  
09 On November 5, 2001, ALJ Dethloff issued a decision granting plaintiff's application for disability  
10 beginning November 5, 2001, but not prior to that date. (AR 21-24.)

11 Plaintiff appealed the ALJ's decision to the Appeals Council, which granted his request for  
12 review. (AR 334-36.) However, on September 17, 2004, the Appeals Council also found plaintiff  
13 disabled as of November 5, 2001, but not prior to that date. (AR 9-12.) Plaintiff appealed this  
14 final decision of the Commissioner to this Court.

### 15 **JURISDICTION**

16 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

### 17 **DISCUSSION**

18 The Commissioner follows a five-step sequential evaluation process for determining  
19 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
20 be determined whether the claimant is gainfully employed. While the ALJ found that plaintiff had  
21 engaged in substantial gainful activity until November 5, 2001, the Appeals Council later  
22 concluded that plaintiff had not engaged in substantial gainful activity since January 16, 2001, the  
23 alleged onset date. At step two, it must be determined whether a claimant suffers from a severe  
24 impairment. The ALJ and Appeals Council found plaintiff's ischemic heart disease a severe  
25 impairment. Step three asks whether a claimant's impairments meet or equal a listed impairment.  
26 The ALJ and Appeals Council found that plaintiff's impairment did not meet or equal a listed

01 impairment. If a claimant's impairments do not meet or equal a listing, the Commissioner must  
02 assess residual functional capacity (RFC) and determine at step four whether the claimant has  
03 demonstrated an inability to perform past relevant work. The ALJ and Appeals Council found that  
04 plaintiff had the RFC to perform sedentary work, but could not perform his past relevant work.  
05 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the  
06 Commissioner to demonstrate at step five that the claimant retains the capacity to make an  
07 adjustment to work that exists in significant levels in the national economy. The ALJ and Appeals  
08 Council applied the Medical-Vocational Guidelines and found plaintiff disabled only as of  
09 November 5, 2001.<sup>2</sup>

10 This Court's review of the ALJ's decision is limited to whether the decision is in  
11 accordance with the law and his findings supported by substantial evidence in the record as a  
12 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more  
13 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
14 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750  
15 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's  
16 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.  
17 2002).

18 In this case, plaintiff argues that the ALJ and/or Appeals Council failed to properly assess  
19 his RFC, improperly relied on the Medical-Vocational Guidelines at step five, and improperly  
20 rendered an adverse credibility finding. He requests that his testimony be credited and this matter  
21 remanded for a payment of benefits as of January 16, 2001. The Commissioner argues that the  
22 decision is supported by substantial evidence and should be affirmed. For the reasons described  
23 below, the undersigned agrees with the Commissioner that the decision should be affirmed.

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25 <sup>2</sup> Because the ALJ found that plaintiff had engaged in substantial activity prior to  
26 November 5, 2001, only the Appeals Council applied the Medical-Vocational Guidelines to this  
earlier time period.

Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001); *see also Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002). In finding a social security claimant's testimony unreliable, an ALJ must render a credibility determination with sufficiently specific findings, supported by substantial evidence. "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

Here, the ALJ found plaintiff's assertions concerning his ability to work credible. (AR 23.) However, in further considering plaintiff's credibility, the Appeals Council found as follows:

The Appeals Council considered the claimant's statements concerning the subjective complaints (Social Security Ruling 96-7p). The claimant had a medically determined condition which could reasonably be expected to produce the symptoms alleged for the period before November 5, 2001. However, the subjective complaints are not fully credible for that period. Although the claimant could not continue on his work attempts in April and September 2001, these jobs required greater than sedentary exertion. The claimant indicated in February 2002 that he cooked, shopped, carried groceries, cleaned his home, and took daily walks for 20 to 30 minutes. He also alleged various capabilities including lifting of 20 pounds which are not inconsistent with the ability to do sedentary work (see Exhibit 3E). Opinions provided by the medical expert at the hearing and the claimant's treating source (Exhibit 10F) are also consistent with an ability to do sedentary work. Therefore, the Appeals Council has adopted the Administrative Law Judge's findings concerning the claimant's residual functional capacity for the entire period at issue.

The representative has contended that the treating source reported that the claimant's disability began on January 16, 2001, with an expectation of return to work on April 1, 2001 (Exhibits 9E and AC-5). Although the claimant's work attempt failed by June 2001, this was at a greater exertional level than sedentary which this same source reported later the claimant was capable of performing. While the claimant may not have been able to perform sedentary work for a brief period beginning in January

01 2001, he was not precluded from sedentary work for a continuous period of at least  
02 12 months.

03 (AR 10.)

04 Plaintiff alleges that the Appeals Council failed to provide clear and convincing reasons for  
05 rejecting his testimony, and failed to give sufficient weight or even provide any significant  
06 discussion as to his subjective complaints. He asserts that the Appeals Council selectively read  
07 and misconstrued his February 2002 statements, noting he also said he was careful not to do too  
08 much because he tired quickly, would need fifteen minutes rest after sitting for an hour and a half,  
09 and, while he used to do yard work, help clean the house, and take out the trash, he now hardly  
10 did anything. (AR 85-86.) He also notes that, in any event, these February 2002 statements  
11 occurred well after his 2001 treatment for two heart attacks, when his condition was much more  
12 severe. Plaintiff notes that rather than opining that he could perform sedentary work in 2001, his  
13 treating physician, Dr. Gary Oppenheim, removed him from the workforce due to his cardiac  
14 impairment. ( *See* AR 112-13.) Plaintiff asserts that, given the failure to properly assess his  
15 testimony, it should be credited as true. *See Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996).

16 Although not reciting all of plaintiff's February 2002 statements, the Appeals Council  
17 accurately recited the statements relied upon in the decision. ( *See* AR 10, 84-88.) Also, the  
18 Appeals Council accurately noted that both testimony from the medical expert, Dr. Thompson,  
19 and the opinion of Dr. Oppenheim were consistent with sedentary work. (*See* AR 302, 305 (April  
20 17, 2002 letter from Dr. Oppenheim stating that plaintiff was "capable of light capacity with  
21 ordinary desk type job with no lifting of more than 20 lbs. and no distance walking."), AR 309  
22 (February 4, 2003 letter from Dr. Oppenheim stating that plaintiff "is capable of performing a job  
23 where he can sit for six hours per day with normal breaks and mild activity."), and AR 385 (Dr.  
24 Thompson testified that plaintiff could perform sedentary work.)) While this evidence may not  
25 directly relate to the period immediately after plaintiff's heart attacks, it was not irrelevant to the  
26 credibility assessment.

01 In any event, the Appeals Council also appropriately relied on evidence specifically related  
02 to the months following plaintiff's heart attacks. The Appeals Council noted that plaintiff's 2001  
03 work attempts involved greater than sedentary exertion. It also made reference to Dr.  
04 Oppenheim's expectation, in March 2001, that plaintiff would be able to return to work in April  
05 2001 (*see* AR 112), supporting the conclusion that plaintiff was not precluded from sedentary  
06 work for a continuous period of at least twelve months and, therefore, not disabled under Social  
07 Security regulations. *See* 20 C.F.R. § 404.1509 ("Unless your impairment is expected to result  
08 in death, it must have lasted or must be expected to last for a continuous period of at least 12  
09 months.")

10 Plaintiff fails to demonstrate error in the Appeals Council's credibility assessment. Instead,  
11 the record shows that the Appeals Council provided clear and convincing reasons for finding  
12 plaintiff's testimony not fully credible.

#### 13 RFC Assessment

14 Plaintiff raises several arguments relating to the RFC assessment in his case. However, for  
15 the reasons described below, plaintiff fails to demonstrate error in the RFC assessment of the ALJ  
16 and Appeals Council.

#### 17 1. Social Security Ruling 96-8p

18 Plaintiff first argues that both the ALJ and Appeals Council failed to properly assess his  
19 RFC under Social Security Ruling (SSR) 96-8p. Pursuant to that rule, the ALJ must identify  
20 plaintiff's functional limitations or restrictions and assess his work-related abilities on a function-  
21 by-function basis, including a narrative discussion. *See* 20 C.F.R. §§ 404.1545, 416.945; SSR 96-  
22 8p. SSR 96-8p indicates that only after this function-by-function assessment may the RFC be  
23 expressed in terms of the exertional levels of work, such as sedentary or light. Plaintiff asserts that  
24 the ALJ and Appeals Council failed to perform a function-by-function analysis and, instead, simply  
25 deemed him limited to sedentary work. (AR 22-23.) He further states that the Appeals Council  
26 failed to analyze his non-exertional limitations and simply limited him to no lifting or carrying over

01 ten pounds, and no standing or walking for more than two hours. (AR 11.)

02       The Commissioner notes that SSR 96-8p implicates no less than fifty-four work functions  
03 and argues that, rather than requiring a discussion of all of plaintiff's abilities on a function-by-  
04 function basis, the ALJ was required to explain how the evidence supported his conclusions. *See*  
05 SSR 96-8p ("The RFC assessment must include a narrative discussion describing how the evidence  
06 supports each conclusion, citing specific medical facts (e.g., laboratory findings) and nonmedical  
07 evidence (e.g., daily activities, observations). In assessing RFC, the adjudicator must discuss the  
08 individual's ability to perform sustained work activities in an ordinary work setting on a regular  
09 and continuing basis (i.e., 8 hours a day, for 5 days a week, or an equivalent work schedule), and  
10 describe the maximum amount of each work-related activity the individual can perform based on  
11 the evidence available in the case record.") The Commissioner maintains that the ALJ met this  
12 requirement and rendered a proper RFC assessment.

13       According plaintiff the benefit of the doubt and liberally construing the evidence of record,  
14 the ALJ determined that plaintiff could perform sedentary work. (AR 22.) The ALJ noted Dr.  
15 Thompson's testimony that, while plaintiff "would likely be limited to sedentary work, [he] could  
16 likely manage to walk on the level adequately[,] and "should do almost no lifting." (*Id.*) The  
17 Appeals Council adopted the ALJ's RFC assessment "for the entire period at issue" and concluded  
18 that plaintiff had the ability to perform sedentary work prior to November 5, 2001. (AR 10.) As  
19 recognized by plaintiff, the Appeals Council further addressed plaintiff's functional limitations,  
20 specifically finding him limited to no lifting or carrying over ten pounds, and to no standing or  
21 walking for more than two hours. (AR 11.)

22       The above described assessment sufficiently addresses plaintiff's work related limitations  
23 on a function-by-function basis pursuant to SSR 96-8p. The Court, therefore, disagrees that the  
24 ALJ and Appeals Council simply deemed plaintiff limited to sedentary work. Moreover, because  
25 the Appeals Council provided clear and convincing reasons for finding plaintiff's subjective  
26 complaints not fully credible, it did not err in failing to specifically address in its RFC assessment



01 the non-exertional limitations testified to by plaintiff.

02 2. Medical Expert's Testimony

03 Plaintiff next argues that the Appeals Council's conclusion that he had the RFC to perform  
04 the full range of sedentary work is contradicted by the medical expert's testimony that he "would  
05 not clear him for security-type work or work that potentially means he has to move fast or walk  
06 up stairs[.]" (AR 385.) However, neither the ALJ, nor the Appeals Council found plaintiff  
07 capable of performing his past security work, and sedentary work requires only occasional  
08 walking, with no mention of walking fast or up stairs. *See* 20 C.F.R. § 404.1567(a). Therefore,  
09 the sedentary classification is not contradicted by the medical expert's testimony.

10 3. Low Stress Limitation

11 Finally, plaintiff asserts that he would require a low stress position – a limitation never  
12 addressed by the ALJ or Appeals Council in assessing his RFC. In support, plaintiff points to the  
13 opinion of Dr. Oppenheim. (AR 309.) However, while Dr. Oppenheim did note that plaintiff's  
14 chest discomfort was increased by both physical and emotional distress, he did so in relation to  
15 plaintiff's inability to perform in a security guard position. *Id.* He went on to state: "However,  
16 he is capable of performing a job where he can sit for six hours per day with normal breaks and  
17 mild activity." *Id.* (*See also* AR 302, 305 (on April 17, 2002, Dr. Oppenheim opined that plaintiff  
18 was "capable of light capacity with ordinary desk type job with no lifting of more than 20 lbs. and  
19 no distance walking."))

20 Plaintiff notes that Dr. Oppenheim rendered this opinion in February 2003, well after  
21 plaintiff's January 16, 2001 heart attack. However, as noted above, Dr. Oppenheim also earlier  
22 gave plaintiff an April 2001 expected date of release to work. (AR 112.) *See also* 20 C.F.R. §  
23 404.1509 ("Unless your impairment is expected to result in death, it must have lasted or must be  
24 expected to last for a continuous period of at least 12 months.") In fact, there does not appear  
25 to be any evidence that Dr. Oppenheim would have found plaintiff incapable of performing in a  
26 sedentary position following his release to work.



Medical-Vocational Guidelines

Plaintiff argues that the Commissioner improperly relied on the Medical-Vocational Guidelines, or “grids,” at step five. The Commissioner can satisfy the step five burden by either calling a vocational expert or applying the grids. *Tackett v. Apfel*, 180 F.3d 1094, 1100-01 (9th Cir. 1999). However, use of the grids would not be appropriate where “non-exertional limitations significantly limit the range of work permitted by [] exertional limitations.” *Id.* at 1101-02. In that event, the ALJ would be required to call a vocational expert to establish whether a claimant was disabled. *Id.* at 1102.

Here, while the ALJ did call a vocational expert at the hearing, he found plaintiff disabled under Medical-Vocational Guideline 201.14 for the period beginning November 5, 2001. (AR 22). *See also* Rule 201.14, 20 C.F.R. Part 404, Subpt. P, App. 2. Although this rule would not direct a finding of disability until plaintiff turned fifty – in January 2002 – the ALJ applied the rule “in a non-mechanical manner in keeping with the regulations.” (AR 22.) The Appeals Council adopted the ALJ’s findings for the period beginning November 5, 2001. (AR 9-12.) However, the Appeals Council further found plaintiff not disabled prior to November 5, 2001 pursuant to Medical-Vocational Guideline 201.21. (AR 11.) *See also* Rule 201.21, 20 C.F.R. Part 404, Subpt. P, App. 2.

Plaintiff maintains the inapplicability of both grid rules given his significant non-exertional limitations, including pain, shortness of breath, and fatigue. The Commissioner asserts that all impairments associated with plaintiff’s heart disease were thoroughly and carefully discussed at the hearing and evaluated by the ALJ and Appeals Council. She points to plaintiff’s own testimony that chest pains, shortness of breath, and fatigue occurred when he overextended himself, and further notes that Dr. Oppenheim found him capable of performing light work. (AR 302, 305, 352, 355-56.) The Commissioner asserts that there is no credible evidence of any significant non-exertional limitations precluding plaintiff from performing the full range of sedentary work, or precluding the use of the grids. In response, plaintiff asserts that his testimony

01 and the testimony of the medical expert support the conclusion that he suffered non-exertional  
02 limitations both when he exerted himself and while at rest. (AR 356-57, 375-77.) Plaintiff also  
03 again notes that Dr. Oppenheim's opinions as to his ability to work were rendered after he had  
04 received more than a year of treatment. (AR 302, 305, 309.)

05 Again, as discussed above, the Appeals Council provided clear and convincing reasons for  
06 finding plaintiff's testimony – including that related to any alleged non-exertional limitations – not  
07 fully credible. Moreover, while the medical expert recognized plaintiff's testimony as to the  
08 presence of non-exertional symptoms at rest, he nonetheless maintained that plaintiff could  
09 perform sedentary work. (AR 375-77.) Additionally, and also as noted above, Dr. Oppenheim  
10 did not believe plaintiff's impairments in 2001 would last for a continuous period of twelve  
11 months, and later found plaintiff capable of light and sedentary work. Consequently, plaintiff fails  
12 to demonstrate that the Commissioner improperly relied on the Medical-Vocational Guidelines at  
13 step five.

#### 14 CONCLUSION

15 For the reasons set forth above, the Commissioner's decision in this case should be  
16 affirmed. A proposed Order accompanies this Report and Recommendation.

17 DATED this 2nd day of June, 2005.

18 

19 Mary Alice Theiler  
20 United States Magistrate Judge